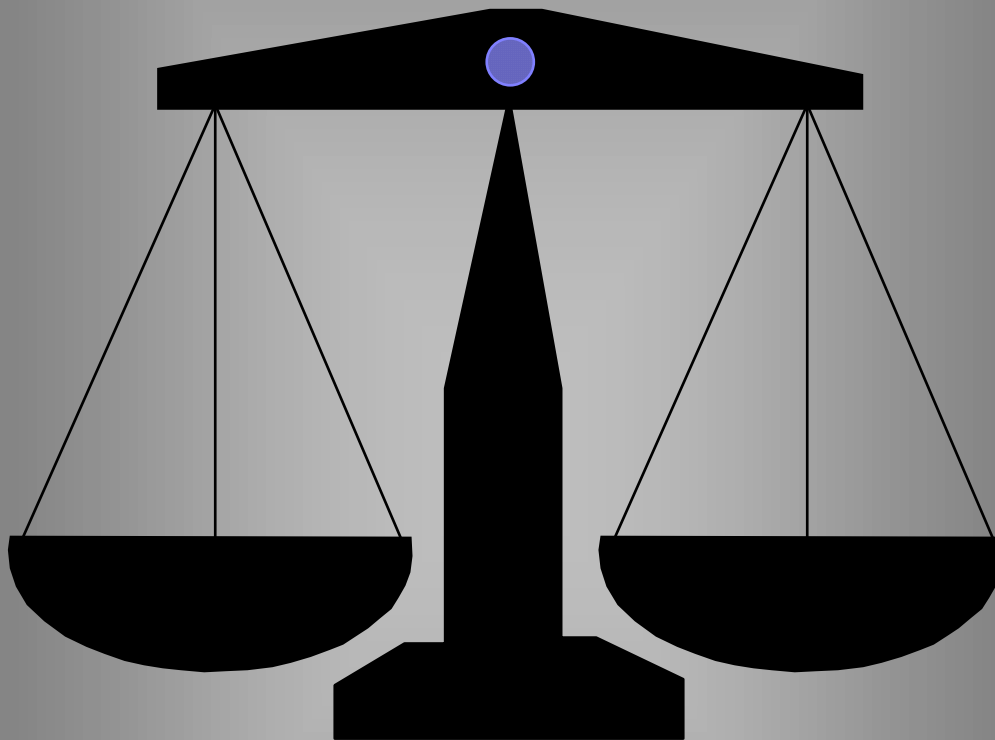


HOLD HARMLESS PROVISIONS AND INSURANCE SPECIFICATIONS IN CONTRACTS



**Prepared by
The Risk Management
&
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Revised April 9, 2003 (revisions noted in blue)

Revised March 1, 2004 (revisions noted in red)

Revised November 23, 2004 (revisions noted in green)

PREFACE

These guidelines were developed to provide state agencies, attorneys, contract specialists, or other agency staff who are responsible for developing contracts with assistance in minimizing TORT liability through contractual arrangements.

The information provided herein is designed to raise questions as well as provide options and possible solutions. Agency contracts may differ substantially based upon industry standards or compliance with specific statutes. In some instances, further research may be required especially where there are questions of law, which may vary by jurisdiction or recent court decisions.

Contractual transfer is an important way for state agencies to manage their contractual risk by shifting it to independent contractors, insurers, or other third parties. It is an integral part of the state's program for managing, organizing, and treating risks associated with services provided under contract.

Copies of this document will be distributed through the Risk Management Advisory Committee to appropriate agency staff. The Risk Management and Tort Defense Division recommends that each agency establish a process by which contracts are reviewed and approved by an attorney who understands contracts and is familiar with the information provided in this manual.

Upon agency request, and subject to workload considerations, the Risk Management and Tort Defense Division will review contracts prior to signature and provide training for appropriate agency personnel. The guidelines contained herein are subject to change and updates will be provided as necessary. This 3rd edition of the Hold Harmless Provisions and Insurance Specifications in Contracts is effective November 23, 2004.

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INTRODUCTION

The liability that the State of Montana has for acts of its employees in the course of job-related duties is well established in the law.

The state, for example, may be held liable for the negligence of employees driving a state vehicle partially on the grounds that the state exercises a degree of control over the way in which its employees perform their tasks.

A less obvious liability exposure is created when non-employees, such as independent contractors, perform work for the state.

Even though state agencies exercise no control over the way in which a contractor performs its work, they may still be held liable for injury or damage arising out of contractor's work under certain circumstances.

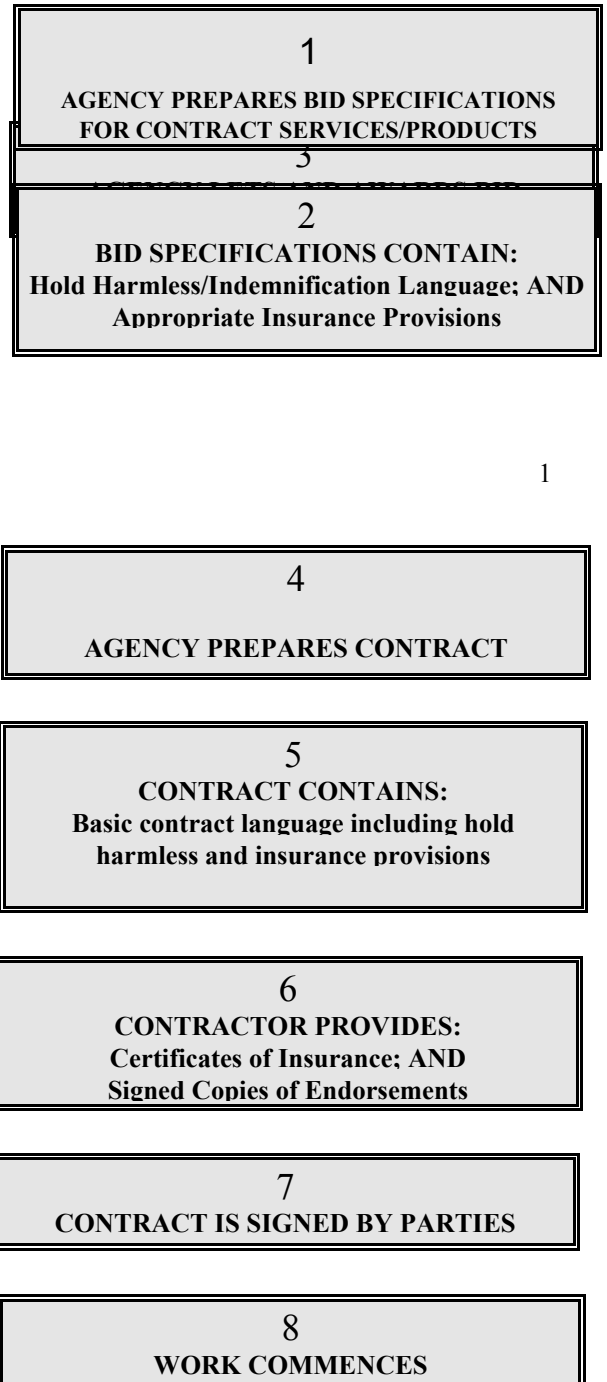
Those circumstances fall into three groups:

*Work that is inherently dangerous.
Projects that impose no delegable duties on the
project owner under local, state, or
federal law.
Negligence of the state in hiring an
incompetent
contractor.*

In recent court cases, public entities have increasingly been held responsible for the acts of their contractors even when the contractor was negligent.

State agencies should attempt, where feasible, to transfer the risk stemming from performance of a contract to the contractor.

A summary of the process for preparing contracts is provided in the next column:



CONTRACTUAL RISK TRANSFER

What is a contract?

By definition, a contract is an agreement between two or more parties, which creates an obligation to do or not to do a particular thing. The document containing such an agreement is usually in writing, although a contract can be oral.

The division of risk between the state and its contractors is often a matter of negotiating on a case-by-case basis. No set of instructions can provide enough information on negotiation. Essentially, the parties to the contract will have to reach an agreement.

Contractual Transfer Concerns

There are a number of potential concerns, which may arise with respect to contracts or contractor insurance:

- Contractor's commercial general liability policy typically excludes supervisory acts of the state which result in loss.
- Contractor purchases the wrong type of insurance.
- Contractor provides insurance which is excess of any other insurance, including the state's insurance.
- Contractor purchases 'claims made' liability insurance coverage versus 'occurrence' coverage.
- Contractor fails to specifically name the state as an 'additional insured' under its insurance policy.
- Contractor violates statutory responsibility for

employee safety or inspection and files a claim against the state.

- Contractor's insurance lapses. In the event of contractor negligence, the contractor is rendered insolvent and the state is held responsible for damages.
- Contractor's employees are injured and file a claim against the state.
- Inadequate contractor insurance limits. If the contractor has an aggregate insurance policy and prior losses, the state may not be protected in the event of contractor negligence.
- Insurance policy exclusions.
- Incompetent contractor.
- Contractor failure/insolvency.
- Contractor's insurance company becomes insolvent.

Most of these concerns are avoided through appropriate contract indemnification language and insurance specifications and are addressed in subsequent sections.

Why Transfer Risk?

The question is often asked, why transfer contractual risk, why doesn't the state just assume it? A few of the more important reasons are summarized below:

- The state is self-insured. Most losses due to negligence of a contractor are paid from the state self-insurance fund if no transfer is made.
- Risk Transfer is required by law for independent contractors (10 U.S.C. 2921, MCA). Only in unusual and extenuating circumstances, and with prior approval of the Risk Management and Tort Defense Division, should state agencies agree to 'hold harmless' and 'indemnify' contractors (Risk Management Program Manual – Section VI. Contractual Transfer).
- The potential loss stemming from performance of many contracts is too large for the state to handle.
- The contractor is usually in a better position to

assimilate the loss because of:

Experience.

Financial capacity.

Position to control the work.

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How is Risk Transferred?

Wherever possible, state agencies should seek to shift or transfer the risk of loss from themselves to another party. The success of the transfer will depend upon the bargaining position of the parties, their skill in writing contracts, the type of business being contracted, industry customs, legal statutes, and equity.

Risk transfer can usually be accomplished in two ways. These methods are not mutually exclusive. Successful risk transfer includes a combination of both:

- ❶ Carefully worded "hold harmless and indemnification" contract language.
- ❷ Contractual requirements for the contractor to purchase insurance. Appropriate insurance coverage provides protection to the state and to the contractor for the contractor's negligent acts, and becomes especially important when the contractor has agreed to hold harmless, defend, and indemnify the state.

DEVELOPING CONTRACTS

This section provides a framework for developing contractual agreements. Agency contracts may differ substantially based upon type of contract, industry standards, or specific federal or state regulations.

Hold Harmless and Indemnification Clauses

A hold harmless and indemnification clause in a contract is essentially a transfer mechanism where one party assumes, by contract, the liability of another. In the absence of such agreement, each party would be responsible for its own negligence and for its share of joint negligence.

Hold harmless and indemnification agreements differ

considerably in the way that they are worded and to the extent that they transfer liability. To be valid, a hold harmless and indemnification clause must be specific. Hold harmless and indemnification agreements should have 'hold harmless' language and require the contractor to defend (pay all legal costs) and indemnify (pay all settlements or judgments) for activities of the contractor associated with performance of the contract. Hold harmless and indemnification agreements are useful to clarify and pinpoint accountability. Their value, alone, without insurance or other secured financial transfer devices, is limited.

The type of hold harmless and indemnification clause obtained by each state agency will depend on negotiating abilities, skill in writing contracts, and the bargaining position of the parties. A brief explanation of the various types of hold harmless and indemnification agreements is provided below: For sample language, please see pages 7-12.

- ❶ **Limited Form** - Requires the contractor to be responsible for his/her own negligence.

Under a limited form hold harmless and indemnification agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for liability arising out of the negligent acts or activities of the contractor.

- ❷ **Intermediate Form** - Requires the contractor to be responsible for his/her own negligence or the joint negligence of the contractor and the agency.

Under an intermediate form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project, except that arising out of the sole negligence of the agency.

- ③ **Broad Form** - Requires the contractor to be responsible for all liability arising out of the project (including the sole negligence of the agency).

Under a broad form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project.

Agencies should attempt to negotiate broad form coverage where feasible. Since some insurers may not offer this coverage, intermediate or limited form agreements are acceptable.

Finally, a hold harmless and indemnification clause is only as good as the contract itself and the resources of the other party.

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The clause does not guarantee the following:

- ❑ That the contract itself is good, or that the courts will enforce the clause if it is against public policy.
- ❑ That the party who assumes the liability will be financially able to pay damages or respond.
- ❑ That the insurer of the assuming party will cover loss due to exclusions under the contractual liability coverage.

Examine Carefully

- ⊙ Acts of the:
 - Contractor.
 - Contractor's employees and agents.
 - Contractor's subcontractors.
- ⊙ The sole negligence of the contractor and the joint negligence of the contractor and the agency.
- ⊙ All liability arising out of the project, not just bodily injury and property damage.
- ⊙ Damages or injury to:
 - × Contractor's employees and agents.
 - × Contractor's property.
 - × Third parties.

Contract hold harmless and indemnification language, in

and of itself, is usually insufficient to protect the state in the event of a loss for the following reasons:

- ◆ In the event that the state and the contractor have both signed hold harmless and indemnification agreements or liability is in question, the courts have been known to 'throw out' the contracts and turn to the contractor's/contractee's insurance policies for recovery.
- ◆ In the event of a large loss, the contractor may become insolvent and in the absence of insurance, the courts may look to the agency that signed the contract for recovery.

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When transferring risk through the use of a hold harmless and indemnification clause, there are a number of points to discuss thoroughly before executing the contract. The major points are:

- ◇ Spell out in the contract each parties' obligations.
- ◇ Make certain that the other party has the financial ability to assume the liability, either through their own resources or insurance to back their commitment.

Remember that when transferring liability, a hold harmless and indemnification agreement does not excuse the state from tort liability. The agreement simply provides a contractual right to pursue recovery from the other party assuming the liability.

If the contractor or its insurer is uninsured or becomes insolvent, or if the court does not uphold the hold harmless agreement, then the state remains legally obligated to satisfy the damaged third party.

CONTRACTOR INSURANCE

In addition to hold harmless and indemnification language, insurance is a vital mechanism whereby risk is transferred from the state to the contractor's insurer by requiring the contractor to purchase insurance coverage.

Insurance becomes especially important when the contractor has agreed to defend and indemnify the state.

We have outlined on the next page some of the basic types of insurance that agencies should typically require of a contractor by contract type.

INSURANCE COVERAGE

| Type of Contract | General Liability | Vehicle Liability | Professional Liability | Fire & Extended Coverage or All Risk | Workers' Compensation Coverage |
|--|--------------------------|--------------------------|-------------------------------|---|---------------------------------------|
| Construction Contracts | ✓ | * | * | ✓ | ✓ |
| General Services Contract s (e.g. housekeeping, maintenance, etc.) | ✓ | * | | | ✓ |
| Lease (tenant of entire building or ground lease with building reverting to agency) | ✓ | | | ✓ | |
| Traditional professional service contracts (i.e. architects, accountants, engineers, doctors, lawyers, medical, etc.) | ✓ | * | ✓ | | ✓ |
| Miscellaneous professional service contracts (i.e. non-traditional etc.) | ✓ | * | * | | ✓ |
| Transportation contracts or where contract requires substantial use of automobile. | * | ✓ | | | ✓ |

* Optional – where there is an exposure or risk that would warrant insurance.

✓ Usually required.

Where insurance is required of a contractor, it is important that agencies: 1) require the contractor to name the state as an 'additional insured' where

feasible; 2) obtain certificates of insurance - proof of contractor's insurance coverage; 3) specify via insurance/bid requirements what type of coverage is

required given the risk; and 4) obtain written copies of the endorsement and/or certificates of insurance from the contractor and/or its insurer prior to provision of a service and/or procurement of a product.

Additional Insured Provisions

An additional insured is a person or organization, other than the named insured, who is protected under the terms of the contract. Typically, the named insured in an insurance contract is the independent contractor.

State agencies should require each contractor to name the state as an additional insured, where feasible, in the contractor's certificates of insurance and under the contractor's insurance policy via endorsement to the policy.

The most common reasons for requiring the contractor to name the state as an additional insured are listed below:

- ❑ The contractor's obligations are not dismissed due to bankruptcy.
- ❑ Coverage is provided for the state's defense expenses and other claims costs.
- ❑ The insurer may not subrogate claims against the state.
- ❑ The contractual liability insurance affords a degree of indirect financial security to the state. (There is another entity, the insurer, to whom the state can go for coverage of claims and related expenses mentioned in the hold harmless agreement.)

Being an additional insured is not a substitute for a hold harmless agreement because it protects only against perils covered in the insurance policy. Both are needed in the agreement for financial considerations.

How do state agencies request to be named as an additional insured under the contractor's policy? When executing bid specifications, under insurance coverage's required, request to be named as an additional insured (see Page 7).

Certificates of Insurance

As previously stated, one-way to ensure compliance of the hold harmless clause is the financial strength

of the party to whom the risk is transferred. This can be done by asking for a certificate of insurance.

The certificate of insurance provides evidence of contractor insurance and should indicate the type of coverage, limits of liability, and term of insurance. A certificate should be signed by an authorized agent of the insurer or an officer of the insurance company.

This is not a contract--only evidence of coverage at the time the certificate is issued. Having a certificate is no guarantee that the policy is currently in force or that coverage is as requested.

In addition to certificates of insurance, state agencies should require and obtain copies of the appropriate endorsements or policy language prior to the provision of the service or procurement of the product.

Policing Certificates

The certificates of insurance supplied by many companies and insurers are not adequate. Following is a checklist of what a certificate should contain:

- * Limits of liability requested in the specifications.
- * A clear description of the general nature of the coverage and the extension endorsements, i.e. general liability, automobile liability, worker's compensation, employers liability etc.
- * A statement that the policy will stay in force and that no material change will take place to the policy without prior written notification.
- * A statement that the term of the policy covers the term of the contract.
- * A statement that the state is named as an additional insured.

DETERMINING APPROPRIATE INSURANCE REQUIREMENTS

In an effort to allow greater flexibility in establishing appropriate insurance requirements, the Risk Management & Tort Defense Division and State Procurement Bureau have developed the following guidelines in selecting insurance requirements for bids and proposals.

STEP ONE: Determine what type of insurance should be required.

There are now primarily five separate types of insurance requirements that agencies should evaluate to fit specific insurance needs – Commercial General Liability, Automobile Liability, Professional Liability, Workers' Compensation, and Property. For contracts that fall under the purview of the Montana Procurement Act, agencies should work with the State Procurement Bureau or agency legal counsel to determine which insurance types should be included in the solicitation document for all bids and proposals. (The State Procurement Bureau will contact the Risk Management and Tort Defense Division (RMTD) if questions arise about coverage's, endorsements, and/or certificates of insurance.) For all other proposals agencies should work with legal counsel and the Risk Management & Tort Defense Division directly. The five types of insurance are:

- **Commercial General Liability Insurance:** should be required when contractors perform work on state premises or property, other than the routine delivery of supplies. This coverage should also be required where bodily injury or property damage may occur as a result of the service being provided and in most traditional (i.e. accountants, architects, engineers, doctors, lawyers, etc.) professional liability contracts.
- **Automobile Insurance:** should be required if the contractor will be transporting state employees, state guests, state clients, or state products as part of the contract.
- **Professional Liability Insurance:** should be required in most traditional professional liability contracts (i.e. accountants, architects, doctors, engineers, lawyers, etc.) and in all other miscellaneous professional liability contracts where errors and omissions may result in significant economic damages for anyone who gives advice or provides services on which others have reason to rely and may be subject to legal action if the advice or service proves faulty.
- **Property Insurance:** should be required in any contract that involves renovation or construction of state buildings.
- **Workers' Compensation insurance or an exemption:** should be required in all contracts.

STEP TWO: Evaluate the risk associated with the contract.

The Risk Management and Tort Defense Division recommends that state contracts require limits of \$1,000,000 per occurrence /\$2,000,000 per aggregate since these limits most closely coincide with the state's tort damage caps. However, RMTD recognizes that the state enters into contracts in which the standard levels of coverage may be excessive with certain contracts. Agencies should work with agency legal counsel to determine if the level of risk associated with the contract is low, moderate, or high. The size of the contract in and of itself should not determine coverage limits. Any questions should be directed to RMTD (444-2421). If exceptions are made to the \$1,000,000/\$2,000,000 recommended levels, RMTD must be notified.

RMTD has developed the following table as an aid in Determining appropriate insurance requirements for various risk levels (next page).

TYPE OF INSURANCE**LOW MODERATE HIGH
(COMBINED SINGLE LIMITS, except for Auto)**

General Liability

\$300,000 per
occurrence\$500,000 per
occurrence\$1,000,000 per
occurrence\$600,000
aggregate\$1,000,000
aggregate\$2,000,000
aggregate

Auto

Split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage);

OR

Combined single limits of \$1,000,000 per occurrence to cover to cover such claims as may be caused by any act, omission, or negligence of the Contractor or its officers, agents, representatives, assigns or subcontractors.

Professional Liability

\$300,000 per
occurrence\$500,000 per
occurrence\$1,000,000
occurrence\$600,000
aggregate\$1,000,000
aggregate\$2,000,000
aggregate

Property

Replacement
Cost usuallyReplacement
CostReplacement
Cost

Workers' Compensation

Statutorily
Defined" "
" "" "
" "

Note: the level of risk may vary within the same contract if more than one type of insurance is required. The insurance limits stated in these specifications are recommended minimums and may need to be increased or reduced to reflect the risk associated with performance of the contract.

SAMPLE SPECIFICATIONS FOR STATE CONTRACTS

Common Provisions

(Please incorporate these into the RFP or bid document in the order in which they appear.)

I. Hold Harmless and Indemnification Clauses

The contractor agrees to protect, defend, and save the state, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of the contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the contractor and/or its agents, employees, representatives, assigns, subcontractors, **and the state***, under this agreement.

NOTE: Throughout these specifications, the sample hold harmless and indemnification provisions are broad form, meaning that the contractor is expected to defend and indemnify the state agency for any and all claims, including claims for which the state or one of its agencies was negligent.

Since many insurers and/or contractors will not accept this language, agencies are encouraged to use **intermediate form (see page 3)** or delete the term **and the state*** to make this a limited form agreement.

II. Insurance

(Insert for commercial general liability and automobile liability only)

Contractor shall maintain for the duration of the contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by the contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

Note: Since contractual liability is not covered in certain professional liability contracts, at the discretion of the agency, the terms contractual liability and contractor as denoted above may need to be deleted from certain

professional liability contracts.

III. Primary Insurance

The contractor's insurance coverage shall be primary insurance as respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees or volunteers shall be excess of the contractor's insurance and shall not contribute with it.

IV. Insurance requirements

Insert the appropriate insurance requirement below based upon the type of contract. See Page 5 for an explanation of the type of contract. Limits will depend upon the risk associated with performance of the contract.

(Insert for commercial general liability only)

Specific Requirements for Commercial General

Liability: The contractor shall purchase and maintain Occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of _____ per occurrence and _____ aggregate per year to cover such claims as may be caused by any act, omission, or negligence of the contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for commercial general liability only)

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insured's; for liability arising out of activities performed by or on behalf of the contractor, including the insured's general supervision of the contractor; products and completed operations; premises owned, leased, occupied, or used.

(Insert for automobile liability only)

Specific Requirements for Automobile Liability: The contractor shall purchase and maintain occurrence coverage with limits of _____ per person (personal injury), _____ per accident (pers. injury), _____ per accident (prop. damage) to cover such claims as may be caused by any act, omission, or negligence of the contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for automobile only)

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insured's for automobiles leased, hired, or borrowed by the contractor.

(Insert for professional liability only)

Specific Requirements for Professional Liability: The contractor shall purchase and maintain Occurrence coverage with combined single limits for each wrongful act of _____ per occurrence and _____ aggregate per year to cover such claims as may be caused by any act, omission, negligence of the contractor or its officers, agents, representatives, assigns or subcontractors. Note: If occurrence coverage is unavailable or cost-prohibitive, the state will accept 'claims made' coverage provided the following conditions are met: 1) the commencement date of the contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years. 2) The claims made policy must have a three-year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for workers' compensation insurance only)

Contractors are required to maintain workers' compensation insurance or an independent contractor's exemption covering the contractor and/or employees while performing work for the State of Montana in accordance with §39-71-120/401/405, Montana Code Annotated. Neither the contractor nor its employees are employees of the state. This insurance/exemption must be valid for the entire contract period.

(Insert for property insurance only new structures only)

At its sole cost and expense, the contractor shall keep the building and all other improvements on the premises insured throughout the term of the agreement against the following hazards:

- Loss or damage by fire and such other risks (not including earthquake damage) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire insurance policies.
- Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.
- Loss or damage by explosion of steam boilers, pressure vessels, and oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

(Insert for property insurance only with existing structures for renovations)

- The contractor shall purchase and maintain Builder's Risk/Installation insurance on a "special causes of loss" form (so called "all risk") for the cost of the work and any subsequent modifications and change orders. The contractor is not responsible for insuring the existing structure for Builder's Risk/Installation insurance.
- At its sole cost and expense, the contractor shall insure all property construction on the premises throughout the term of the agreement against the following hazards:
 - a. Loss or damage by fire and such other risks (not including earthquake damage) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire policies.
 - b. Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.
 - c. Loss or damage by explosion of steam boilers, pressure vessels, oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

V. Deductibles and Self-Insured Retentions

Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency, either: 1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the state, its officers, employees, or volunteer; or 2) at its own expense, the contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

VI. Certificates of Insurance

Insurance is to be placed with an insurer with a Best's rating of no less than A-. All certificates and endorsements are to be received by the state prior to the provision of a service or purchase of a product. The state reserves the right to require complete copies of insurance policies at all times.

Note: The endorsements may be provided on forms approved by the state (See Appendices, Exhibit II).

GLOSSARY

ADDITIONAL INSURED - A person other than the named insured who is protected under the terms of the contract. Usually, additional insured's are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself.

AGGREGATE LIMIT - Usually refers to liability insurance and indicates the amount of coverage that the insured has under the contract for a specific period of time, usually the contract period, no matter how many separate accidents may occur.

BODILY INJURY LIABILITY - A legal liability that may arise as a result of the injury or death of another person.

BROAD FORM PROPERTY DAMAGE - An endorsement to a general liability policy that deletes the exclusion referring to property in the care, custody, or control of the insured and replaces it with a less restrictive exclusion.

CLAIMS-MADE COVERAGE - A policy written on this basis covers only those claims, which occur during the policy period and are reported during the policy period; however, when the insured renews the claims made form, coverage for prior acts is provided back to the retroactive date (the effective date of the original claims made policy with the same insurer).

CERTIFICATE OF INSURANCE - A form, which verifies that a policy has been written and states the coverage in general, often used as proof of insurance in loan transactions and for other legal requirements.

COMBINED SINGLE LIMIT - A single limit of protection for both bodily injury and/or property damage, contrasted with split limits, where specific limits apply to bodily injury or property damage separately.

COMPREHENSIVE GENERAL LIABILITY POLICY - This policy covers the insured against liability for all general liability exposures, unless excluded by the policy. Examples of exposures covered are premises and operations, products and completed operations, independent contractors, and designated contractors.

HOLD HARMLESS AGREEMENT - A contractual arrangement whereby one party assumes the liability inherent in a situation thereby is relieving the other party of responsibility.

INSURABLE INTEREST - Any interest a person has in a possible subject of insurance, such as a car or home, of such a nature that a certain happening might cause financial loss.

INSURED - The party to an insurance arrangement whom the insurer agrees to indemnify for losses, provide benefits for, or render services to.

LIMITS OF LIABILITY - The maximum amount for which an insurer is liable as set forth in the contract.

NAMED INSURED - The party whose name appears on the face of the insurance policy.

OCCURRENCE COVERAGE - A liability provision which specifies that coverage applies to all injuries arising out of occurrences during the policy period regardless of when the claim is made.

REPLACEMENT COST - The price of purchasing or constructing a new item of property to replace an older, used item of property.

SUBROGATION - Legal right of one who has paid an obligation owed by another to collect from the party originally owing the obligation.

APPENDICES

EXHIBIT I.

(INSERT PROJECT TITLE AND CONTRACT NUMBER)

1. PARTIES

THIS CONTRACT, is entered into by and between the State of Montana (insert agency name), (hereinafter referred to as “the State”), whose address and phone number are (insert address), (insert phone number) and (insert name of contractor), (hereinafter referred to as the “Contractor”), whose nine digit Federal ID Number, address and phone number are (insert federal id number), (insert address) and (insert phone number).

THE PARTIES AGREE AS FOLLOWS:

2. EFFECTIVE DATE, DURATION, AND RENEWAL

2.1 Contract Term. This contract shall take effect on (insert date), 20(), and terminate on (insert date), 20(), unless terminated earlier in accordance with the terms of this contract. (Mont. Code Ann. § 18-4-313.)

2.2 Contract Renewal. This contract may, upon mutual agreement between the parties and according to the terms of the existing contract, be renewed in (insert number)-year intervals, or any interval that is advantageous to the State, for a period not to exceed a total of (insert number) years. This renewal is dependent upon legislative appropriations. (State contracts generally may not exceed a total of seven years.)

Section 3 is optional depending on the project.

3. COST/PRICE ADJUSTMENTS

3.1 Cost Increase by Mutual Agreement. After the initial term of the contract, each renewal term may be subject to a cost increase by mutual agreement.

OR

3.1 Cost Increase by Fixed Amount. After the initial term of the contract, each renewal term may be subject to a cost increase of (insert %) %, not to exceed (insert %) %, for the entire term of the contract.

OR

3.1 Pricing Adjustments per Increase in CPI. Annual pricing adjustments to contract renewals following the contract term, if applicable, shall not exceed 75% the rate of increase in the cost of living as reflected in the Federal Bureau of Labor Statistics, Consumer Price Index (CPI) for all Urban Consumers (1982-84=100; through November 1991 = 137.8) or any other index which may be substituted in the future. The CPI for the last 12-month period of the contract will be the CPI base on which later adjustments are computed. Each time an adjustment is made, the earlier CPI base will be replaced by the adjusted CPI base. The percentage of adjustment to contract prices shall in no event exceed the percentage change in the index.

OR

3.1 Price Increases Negotiated Based on Increases in Contractor's Costs. Price increases may be permitted at the time of contract renewal through a process of negotiation with the Contractor and the State. Any price increases must be based on demonstrated industry-wide or regional increases in the Contractor's costs. Publications such as the Federal Bureau of Labor Statistics and the Consumer Price Index (CPI) for all Urban Consumers may be used to determine the increased value.

4. SERVICES AND/OR SUPPLIES

Contractor agrees to provide to the State the following (insert a detailed description of the supplies, services, etc., to be provided).

5. CONSIDERATION/PAYMENT

5.1 Payment Schedule. In consideration for the (insert supplies or services) to be provided, the State shall pay according to the following schedule: (insert pay schedule).

5.2 Withholding of Payment. The State may withhold payments to the Contractor if the Contractor has not performed in accordance with this contract. Such withholding cannot be greater than the additional costs to the State caused by the lack of performance.

6. ACCESS AND RETENTION OF RECORDS

6.1 Access to Records. The Contractor agrees to provide the State, Legislative Auditor or their authorized agents access to any records necessary to determine contract compliance. (Mont. Code Ann. § 18-1-118.)

6.2 Retention Period. The Contractor agrees to create and retain records supporting the (insert services rendered or supplies provided) for a period of three years after either the completion date of this contract or the conclusion of any claim, litigation or exception relating to this contract taken by the State of Montana or a third party.

7. ASSIGNMENT, TRANSFER AND SUBCONTRACTING

The Contractor shall not assign, transfer or subcontract any portion of this contract without the express written consent of the State. (Mont. Code Ann. § 18-4-141.) The Contractor shall be responsible to the State for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by the Contractor. No contractual relationships exist between any subcontractor and the State.

8. HOLD HARMLESS/INDEMNIFICATION

The Contractor agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of the Contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the Contractor and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of the State, under this agreement.

Section 9 needs to be tailored to the project. Call SPB for assistance at 444-2575.

9. REQUIRED INSURANCE

(Insert for commercial general liability and automobile liability only)

9 General Requirements. The Contractor shall maintain for the duration of the contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by the Contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

(Insert for all insurance types)

9.2 Primary Insurance. The Contractor's insurance coverage shall be primary insurance as respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

(Insert for commercial general liability only)

9.3 Specific Requirements for Commercial General Liability. The Contractor shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of (insert dollar amount) per occurrence and (insert dollar amount) aggregate per year to cover such claims as may be caused by any act, omission, or negligence of the Contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for commercial general liability only)

9.4 Additional Insured Status. The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds; for liability arising out of activities performed by or on behalf of the Contractor, including the insured's general supervision of the Contractor; products and completed operations; premises owned, leased, occupied, or used.

(Insert for automobile liability only.)

9.5 Specific Requirements for Automobile Liability. The Contractor shall purchase and maintain coverage with split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage), OR combined single limits of \$1,000,000 per occurrence to cover such claims as may be caused by any act, omission, or negligence of the contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for automobile only.)

9.6 Additional Insured Status. The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds for automobiles leased, hired, or borrowed by the Contractor.

(Insert for professional liability only)

9.7 Specific Requirements for Professional Liability. The Contractor shall purchase and maintain occurrence coverage with combined single limits for each wrongful act of (insert dollar amount) per occurrence and (insert dollar amount) aggregate per year to cover such claims as may be caused by any act, omission, negligence of the Contractor or its officers, agents, representatives, assigns or subcontractors. Note: if "occurrence" coverage is unavailable or cost prohibitive, the Contractor may provide "claims made" coverage provided the following conditions are met: (1) the commencement date of the contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years; and (2) the claims made policy must have a three year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for all insurance types)

9.8 Deductibles and Self-Insured Retentions. Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the State, its officers, officials, employees, or volunteers; or (2) at the expense of the Contractor, the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

(Insert for all insurance types)

9.9 Certificate of Insurance/Endorsements. A certificate of insurance from an insurer with a Best's rating of no less than A- indicating compliance with the required coverages, has been received by the (insert agency name and address). The Contractor must notify the State immediately, of any material change in insurance coverage, such as changes in limits, coverages, change in status of policy, etc. The State reserves the right to require complete copies of insurance policies at all times.

10. COMPLIANCE WITH THE WORKERS' COMPENSATION ACT

Contractors are required to comply with the provisions of the Montana Workers' Compensation Act while performing work for the State of Montana in accordance with sections 39-71-120, 39-71-401, and 39-71-405, MCA. Proof of compliance must be in the form of workers' compensation insurance, an independent contractor's exemption, or documentation of corporate officer status. Neither the contractor nor its employees are employees of the State. This insurance/exemption must be valid for the entire term of the contract. A renewal document must be sent to the **(insert agency name and address)**, upon expiration.

11. COMPLIANCE WITH LAWS

The Contractor must, in performance of work under this contract, fully comply with all applicable federal, state, or local laws, rules and regulations, including the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by the Contractor subjects subcontractors to the same provision. In accordance with section 49-3-207, MCA, the Contractor agrees that the hiring of persons to perform the contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.

Section 12 is optional depending on project.

12. INTELLECTUAL PROPERTY

All patent and other legal rights in or to inventions created in whole or in part under this contract must be available to the State for royalty-free and nonexclusive licensing. Both parties shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish or otherwise use and authorize others to use, copyrightable property created under this contract.

13. PATENT AND COPYRIGHT PROTECTION

13.1 Third Party Claim. In the event of any claim by any third party against the State that the products furnished under this contract infringe upon or violate any patent or copyright, the State shall promptly notify Contractor. Contractor shall defend such claim, in the State's name or its own name, as appropriate, but at Contractor's expense. Contractor will indemnify the State against all costs, damages and attorney's fees that accrue as a result of such claim. If the State reasonably concludes that its interests are not being properly protected, or if principles of governmental or public law are involved, it may enter any action.

13.2 Product Subject of Claim. If any product furnished is likely to or does become the subject of a claim of infringement of a patent or copyright, then Contractor may, at its option, procure for the State the right to continue using the alleged infringing product, or modify the product so that it becomes non-infringing. If none of the above options can be accomplished, or if the use of such product by the State shall be prevented by injunction, the State will determine if the Contract has been breached.

Section 14 is optional, but usually advisable. Agency may choose to accept all forms of security or limit the security to surety bonds only. See following alternate Section 14 for Surety Bond Only language.

14. CONTRACT PERFORMANCE SECURITY – ALL FORMS ACCEPTED

The Contractor must provide contract performance security based upon **(insert %)**% of the contract total.

The contract performance security must be provided by the Contractor in one of the following forms, within 10 working days from the Request for Documents Notice. **ONLY THE FOLLOWING TYPES OF SECURITY ARE ACCEPTABLE AND MUST BE IN ORIGINAL FORM. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE.**

- a sufficient bond from a surety company licensed in Montana with a Best's rating of no less than A- and supplied on the State of Montana's designated form found at <http://discoveringmontana.com/doa/gsd/procurement/forms.asp> and entitled "Contract Performance Bond"; or
- lawful money of the United States; or
- an irrevocable letter of credit not to exceed \$100,000 from a single financial institution and supplied on the State of Montana's designated form found at <http://discoveringmontana.com/doa/gsd/procurement/forms.asp> and entitled "Irrevocable Letter of Credit"; or
- a cashier's check, certified check, bank money order, bank draft, certificate of deposit, or money market certificates drawn or issued by a federally or state-chartered bank or savings and loan association that is insured by or for which insurance is administered by the FDIC or that is drawn and issued by a credit union insured by the national credit union share insurance fund. Certificates of deposit or money market certificates will not be accepted as security for bid, proposal or contract security unless the certificates are assigned only to the State. All interest income from these certificates must accrue only to the contractor and not the State.
- personal or business checks are not acceptable.

See Title 18, chapter 4, part 3, MCA, Title 30, chapter 5, MCA, and ARM 2.5.502.

This contract performance security must remain in effect for the entire term of the contract. A new surety bond or irrevocable letter of credit must be issued to the State of Montana if this contract is renewed.

The contract performance security has been provided to the following address: (insert agency name and address).

OR

14. CONTRACT PERFORMANCE SECURITY – SURETY BONDS ONLY

The Contractor must provide contract performance security based upon 100% of the contract total. This security must be in the form of a surety bond licensed in Montana with a Best's rating of no less than A-. The surety bond must be supplied on the form designated by the State of Montana. The required form may be found at <http://discoveringmontana.com/doa/gsd/procurement/forms.asp> and entitled "Contract Performance Bond." **THE ORIGINAL FORM MUST BE PROVIDED. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE.**

The contract performance security must be provided to the State of Montana within 10 working days from the Request for Documents Notice. This security must remain in effect for the entire term of the contract. A new surety bond must be issued to the State of Montana if this contract is renewed.

The original surety bond form has been provided to the following address: (insert agency name and address).

15. CONTRACT TERMINATION

The following three termination provisions are presented as options for Section 15.1. In deciding which provision to use, consideration should be given to the circumstances of each individual contract.

15.1 Termination for Cause. The State may, by written notice to the Contractor, terminate this contract in whole or in part at any time the Contractor fails to perform this contract.

OR

15.1 Termination for Cause with Notice to Cure Requirement. The State may terminate this contract for failure of the Contractor to perform any of the services, duties, or conditions contained in this contract after giving the Contractor written notice of the stated failure. The written notice must demand performance of the stated failure within a specified period of time of not less than (insert number of days). If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

OR

15.1 Termination for Convenience. The State may, by written notice to the Contractor, terminate this contract without cause. The State must give notice of termination to the Contractor at least **(insert numbers of days)** days prior to the effective date of termination.

15.2 Reduction of Funding. The State, at its sole discretion, may terminate or reduce the scope of this contract if available funding is reduced for any reason. (See Mont. Code Ann. § 18-4-313(3).)

16. LIAISON AND SERVICE OF NOTICES

All project management and coordination on behalf of the State shall be through a single point of contact designated as the State's liaison. Contractor shall designate a liaison that will provide the single point of contact for management and coordination of Contractor's work. All work performed pursuant to this contract shall be coordinated between the State's liaison and the Contractor's liaison.

_____ will be the liaison for the State.

____ (Address)
 ____ (City, State, ZIP)
 ____ (Telephone #)
 ____ (Cell Phone #)
 ____ (Fax #)
 ____ (E-mail)

_____ will be the liaison for the Contractor.

____ (Address)
 _____ (City, State, ZIP)
 _____ (Telephone #)
 _____ (Cell Phone #)
 _____ (Fax #)
 _____ (E-mail)

The State's liaison and Contractor's liaison may be changed by written notice to the other party. Written notices, requests, or complaints will first be directed to the liaison.

17. MEETINGS

The Contractor is required to meet with the State's personnel, or designated representatives, to resolve technical or contractual problems that may occur during the term of the contract or to discuss the progress made by Contractor and the State in the performance of their respective obligations, at no additional cost to the State. Meetings will occur as problems arise and will be coordinated by the State. The Contractor will be given a minimum of three full working days notice of meeting date, time, and location. Face-to-face meetings are desired. However, at the Contractor's option and expense, a conference call meeting may be substituted. Consistent failure to participate in problem resolution meetings two consecutive missed or rescheduled meetings, or to make a good faith effort to resolve problems, may result in termination of the contract.

Section 18 is optional depending on project.

18. CONTRACTOR PERFORMANCE ASSESSMENTS

The State may do assessments of the Contractor's performance. This contract may be cancelled for one or more poor performance assessments. Contractors will have the opportunity to respond to poor performance assessments. The State will make any final decision to cancel this contract based on the assessment and any related information, the Contractor's response and the severity of any negative performance assessment. The Contractor will be notified with a justification of contract cancellation. Performance assessments may be considered in future solicitations.

19. TRANSITION ASSISTANCE

If this contract is not renewed at the end of this term, or is terminated prior to the completion of a project, or if the work on a project is terminated, for any reason, the Contractor must provide for a reasonable period of time after the expiration or termination of this project or contract, all reasonable transition assistance requested by the State, to allow for the expired or terminated portion of the services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such services to the State or its designees. Such transition assistance will be deemed by the parties to be governed by the terms and conditions of this contract, except for those terms or conditions that do not reasonably apply to such transition assistance. The State shall pay the Contractor for any resources utilized in performing such transition assistance at the most current rates provided by the contract. If there are no established contract rates, then the rate shall be mutually agreed upon. If the State terminates a project or this contract for cause, then the State will be entitled to offset the cost of paying the Contractor for the additional resources the Contractor utilized in providing transition assistance with any damages the State may have otherwise accrued as a result of said termination.

20. CHOICE OF LAW AND VENUE

This contract is governed by the laws of Montana. The parties agree that any litigation concerning this bid, proposal or subsequent contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana and each party shall pay its own costs and attorney fees. (See Mont. Code Ann. § 18-1-401.)

21. SCOPE, AMENDMENT AND INTERPRETATION

21.1 Contract. This contract consists of **(insert number)** numbered pages, any Attachments as required, RFP #**(insert RFP number)**, as amended and the Contractor's RFP response as amended. In the case of dispute or ambiguity about the minimum levels of performance by the Contractor the order of precedence of document interpretation is in the same order.

21.2 Entire Agreement. These documents contain the entire agreement of the parties. Any enlargement, alteration or modification requires a written amendment signed by both parties.

22. EXECUTION

The parties through their authorized agents have executed this contract on the dates set out below.

(INSERT AGENCY NAME)

(INSERT CONTRACTOR'S NAME)

(Insert Address)

(Insert City, State, Zip)

FEDERAL ID # **(Insert Number)**

BY: _____
(Name/Title)

BY: _____
(Name/Title)

BY: _____
(Signature)

BY: _____
(Signature)

DATE: _____

DATE: _____

Approved as to Legal Content:

Approved as to Form:

Legal Counsel (Date)
Agency: _____

Procurement Officer (Date)
Agency: _____

EXHIBIT II
(Approved by the Montana State Insurance Commission)

GENERAL LIABILITY ENDORSEMENT

_____**(The State)**
_____**(Additional Insured)**

Attn: _____

A. Policy Information Endorsement # _____

1. Insurance Company _____; Policy Number _____
2. Policy Term (From) _____ (TO) _____ : Effective Date: _____
3. Named Insured (Contractor) _____
4. Limit of Liability Any Occurrence/Aggregate \$ _____ / _____

General Liability Aggregate (Check One):

_____ Applies "per location/project" _____ Is twice the limit?

5. Deductible or Self-Insured Retention (Nil unless other wise specified): \$ _____

6. Coverage is equivalent to (check one):

_____ Commercial General Liability Form #CG0001

7. Bodily Injury and Property Damage Coverage is (check one):

_____ "occurrence" _____ "claims made"

If claims made, the retroactive date is _____

Note: The state's standard insurance requirements specify occurrence coverage. Claims made coverage requires special approval from the Risk Management and Tort Defense Division. If commercial general liability form or equivalent is used, the general aggregate must apply separately to this location/project or the general aggregate must be twice the occurrence limit.

B. POLICY AMENDMENTS

This endorsement is issued in consideration of the policy premium. Notwithstanding any inconsistent statement in the policy to which this endorsement is attached or any other endorsement attached thereto, it is agreed as follows:

1. **INSURED.** The state, its elected or appointed officers, officials, employees, and volunteers are included as additional insured's with regard to damages and defense of claims arising from: (a) activities performed by or on behalf of the named Insured, including the insured's general supervision of the named insured, (b) products and completed operations of the named insured, or (c) premises owned, leased, or used by the named insured.
2. **CONTRIBUTION NOT REQUIRED.** As respects: (a) work performed by the Named Insured for or on behalf of the State; or (b) products sold by the Named Insured to the State; or (c) premises leased by the Named Insured from the State, the insurance afforded by this policy shall be primary insurance as respects the state, its elected or appointed officers, officials, employees, or volunteers; or stand in an unbroken chain of coverage excess of the Named Insured's scheduled underlying primary coverage. In either event, any other insurance maintained by the State, its elected or appointed

officers, officials, employees, or volunteers, shall be in excess of this insurance and shall not contribute with it.

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3. **SCOPE OF COVERAGE.** This policy, if primary, affords coverage at least as broad as:

(a) Insurance Services Office Commercial General Liability Coverage, "Occurrence" form #CG0001

(b) If excess, affords coverage which is at least as broad as the primary insurance forms referenced in the preceding sections (1) and (2).

4. **SEVERABILITY OF INTEREST.** The insurance afforded by this policy applies separately to each insured who is seeking coverage or against whom a claim is made or a suit is brought, except with respects to the Company's limits of liability.

5. **PROVISIONS REGARDING THE INSURED'S DUTIES AFTER ACCIDENT OR LOSS.** Any failure to comply with reporting provisions of the policy shall not affect coverage provided to the State, its elected or appointed officers, officials, employees, or volunteers.

6. **CANCELLATION NOTICE.** The insurance afforded by this policy shall not be suspended, voided, cancelled, reduced in coverage or in limits except after (30) days prior written notice by certified mail return receipt requested has been given to the state. Such notice shall be addressed as shown in the heading of this endorsement.

C. INCIDENT AND CLAIM REPORTING PROCEDURE

Incidents and claims are reported to the insurer at:

Attn: _____
(Title) (Department)

(Company)

(Street Address)

(City) (State) (Zip Code)

(____) _____
(Telephone Number)

D. SIGNATURE OF INSURER OR AUTHORIZED REPRESENTATIVE OF THE INSURER

I, _____, (print/type name), warrant that I have authority to bind the below listed insurance company and by my signature hereon do so bind this company.

SIGNATURE OF AUTHORIZED REPRESENTATIVE
(Original signature required on endorsement furnished to the state)

Organization: _____ Title: _____

Address: _____ Telephone: (____) _____

